KAM SAM MOOI (f) v. SHIN HEONG LONG (f)

[A. C. J. (Ong J.) August 28, 1959]

[K.L. — Civil Appeal No. 17 of 1959]

Landlord and Tenant — Action for trespass against assignee or licensee of tenant — Assignment of tenancy by tenant who was not prohibited from so doing — Whether assignee in lawful occupation.

In this case the respondent purchased the premises in question in 1950 when it was in the occupation of one Goh as tenant. Respondent's husband, Yap, managed her affairs, including collection of rent. Goh spoke to Yap about the assignment of the tenancy to the appellant but Yap stated that he did not agree. In the circumstances no formal notice of assignment of the tenancy was ever given by the appellant to the respondent, and for over 18 months respondent issued receipts for rent in the name of Goh as tenant. On December 6, 1957 respondent addressed a notice to Goh demanding an increase of rent, to which the appellant agreed by letter which she signed in her own name but "for Goh". On December 12 respondent wrote a further letter to Goh stating that she did not know the person who signed on his behalf the consent to increase of rent, and warning him that she would not recognise any third party as tenant. On December 28 appellant in her own name tendered the rent by letter, but it was returned, and on January 15, 1958 respondent gave notice to appellant to vacate the premises before January 31. On April 1, 1958 respondent filed her action, alleging that the appellant had been in unlawful occupation since December 1957.

The appellant denied that her occupation had ever been unlawful on the ground that in April 1956 she had taken an assignment of the tenancy from Goh with the knowledge of Yap, who had continued after such assignment to accept rent from her. It was admitted by Yap, the only witness for the respondent that no agreement had ever been made with Goh prohibiting him from assigning his tenancy.

Held: (1) if, as respondent claimed, the lawful tenant recognised by her was Goh, and no other, then the fact that Goh's tenancy had never been lawfully determined must be fatal to her case because she could not in law maintain any action of trespass against any party in occupation by Goh's leave and licence, and in this case there was no doubt that the appellant was put in occupation by Goh;

(2) the appellant having taken a valid assignment of the tenancy from Goh. the former tenant, who was not prohibited from assigning, was in lawful occupation of the premises.

Cases referred to:—

(1) *Loke Yung Hong* v. *Shanghai Furniture Co.* [1948] M.L.J. 136, 142.

(2) *Lee Thin Pung* v. *Lim Seng Kee* [1948-49] M.L.J. Supp. 72.

(3) *Eusof Ali* v. *Nyonya Lee Gaik Hooi* [1953] M.L.J. 98.

(4) *Ayyar* v. *Parameswara Iyer* [1953] M.L.J. 102.

(5) *Elliott* v. *Johnson* L.R. 2 Q.B. 120.

CIVIL APPEAL.

S. D. K. Peddie for the appellant.

S. M. Yong for the respondent.

Ong J.: This is an appeal against the decision of the Magistrate, Kuala Lumpur, ordering the appellant as occupier of certain premises in Jalan Barat, Kuala Lumpur, to deliver up vacant possession thereof to the respondent, the owner and landlord of the premises.

In her statement of claim the respondent alleged that the appellant had been in unlawful occupation since December 1957, and she prayed judgment for possession and damages for use and occupation at the rental value of $25 per month. The cause of action thus clearly lay in trespass.

The appellant, in her defence, denied that her occupation had ever been unlawful on the ground that in April 1956 she had taken an assignment of the tenancy from a former tenant, Goh Kong Hong, with the knowledge of Yap Chin, the respondent's husband, who had continued after such assignment to accept rent from the appellant. The defence also claims the protection of the Control of Rent Ordinance, but no evidence was led on either side as to whether the premises came within the purview of this Ordinance, and in view of the issue in this case being whether or not the appellant was a trespasser, the question does not arise.

The facts are quite simple. Respondent purchased the premises in 1950, when it was in the occupation of one Goh Kong Hong as tenant. Her husband, Yap Chin, managed her affairs, including collection of rent. Goh spoke to Yap about the assignment, but Yap stated that he did not agree. Apparently for this reason no formal notice of assignment of the tenancy was ever given by appellant to the respondent, and for over 18 months respondent issued receipts for rent in the name of Goh as tenant. On December 6, 1957 respondent addressed a notice to Goh demanding an increase of rent, to which appellant agreed by letter, which she signed in her own name but "for Goh Kong Hong". On December 12, respondent wrote a further letter to Goh stating that she did not know the person who signed on his behalf the consent to increase of rent, and warning him that she would not recognise any third party as tenant. On December 28, appellant in her own name tendered the rent by letter, but it was returned, and on January 15, 1958, respondent gave notice to appellant to vacate the premises before January 31. On April 1, 1958 respondent filed her action.

I would here observe that Yap, the only witness for the respondent, admitted that no agreement had ever been made with Goh prohibiting him from assigning his tenancy.

Upon the pleadings the onus is cast on the respondent to satisfy the Court that appellant is a trespasser.

If, as respondent claims, the lawful tenant recognised by her is Goh, and no other, then the fact that Goh's tenancy had never been lawfully determined must be fatal to respondent's case because she cannot in law maintain any action of trespass against any party in occupation by Goh's leave and licence, and there is no doubt that appellant was put in occupation by Goh.

It is strenuously argued, however, by Mr. Yong that appellant, having pleaded an assign-

ment of the tenancy by Goh, the latter has faded out of the picture, with the result that it is now for the appellant to satisfy the Court, first, that there was in fact an assignment of the tenancy, and secondly, that such assignment is valid in law. I do not agree that the onus has been shifted on to the appellant, by reason of her pleading the assignment. Nevertheless, I must deal with the points raised on behalf of respondent.

Upon the first point, the evidence clearly shows that appellant did take over the tenancy from Goh, and my view is that any attempt by appellant to disguise or conceal that fact from respondent does not in any way alter the truth of the matter.

As to the second, Counsel for respondent contended that I am bound by the judgment of the Court of Appeal in *Loke Yung Hong* v. *Shanghai Furniture Co.*[1] to hold that a parole tenancy from month to month is not assignable without the consent of the landlord, a decision followed by Bostock Hill J. in *Lee Thin Pung* v. *Lim Seng Kee*[2] because, in his view, the judgment of Evans J. was the judgment of the Court of Appeal as Pretheroe Ag. C.J. agreed with it.

In 1953, however, Briggs J. in *Eusof Ali* v. *Nyonya Lee Gaik Hooi*[3], and Wilson J. in *Ayyar* v. *Parameswara Iyer*[4] considered that they were not bound by *Loke Yung Hong's* case. For my own part, I am also of opinion that the decision is not binding on me for the reasons which I shall now proceed to state.

First, I have looked up the record in *Loke Yung Hong's* case, and the essential issue raised in the pleadings therein was whether or not there was a condition in the tenancy agreement prohibiting a sharing or sub-letting of a portion of the premises. In the result the trial Judge held that in effect the tenancy had been assigned, that there was only a contractual obligation on the part of the tenant not to assign, but the landlord failed because he had acquiesced therein. On appeal Pretheroe Ag. C.J. held that the term in the tenancy agreement constituted a condition, and that the assignment was in breach thereof, which entitled the plaintiff to recover possession. He also expressed his agreement with Evans J. "with regard to the *other points raised in this appeal.*"

Now, the points raised in that appeal had been summarised by Evans J. as follows:

> "Before us, the appellant relied on three grounds, arguing that the learned Judge was wrong in holding that the term against assignment might create a contractual obligation but was not a condition, that there was no evidence of appellant's acquiescence in respondent's alleged tenancy, and that the original tenancy remained voidable at his option and not void, so that he was entitled to avoid it on learning the true facts."

On the first of such points, Evans J. came to the same conclusion as Pretheroe Ag. C.J. in holding that the assignment was in breach of a condition of the tenancy, but after having come to that conclusion he went on further to discuss the judgments of Mellor and Lush JJ. in *Elliott* v. *Johnson*[5] who, he thought, "were of opinion that a parole tenancy is not assignable without the consent of the landlord," and he proceeded to state that in his view "the Rent and Charged Land (Restriction) Enactment is intended to protect the occupying tenant and not to confer on him a new vested interest in land which he can sell." In my opinion, these references by Evans J. to *Elliott* v. *Johnson* and to the Enactment were entirely *obiter*. This point was never raised in the pleadings, no argument on it was addressed by Counsel to the Court, and it was not necessary to the judgment that was delivered.

What Pretheroe Ag. C.J. expressed himself as being in agreement with in the judgment of Evans J. was not such *obiter dicta*, but "with regard to the other points raised in this appeal", namely, as to the alleged acquiescence, and as to appellant's right to avoid the tenancy on discovery of the truth. With respect, I do not think that Bostock Hill J. rightly understood what Pretheroe Ag. C.J. intended to say, and did say, regarding his agreement with the judgment of Evans J.

Secondly, *Elliott* v. *Johnson* never was authority for the proposition that a parole tenancy from year to year is not assignable without the consent of the landlord. What that case decides sufficiently appears from the following passage in the judgment of Mellor J.:

> "I am of opinion that our judgment must be for the defendant. The facts appear to be these: A lease for a term of years was granted by the defendant to Messrs. Elliott; the lease contained a stipulation that the tenants should not assign without their landlord's consent, and in the event of their assigning the landlord might enter and take possession; there was also a stipulation that the landlord should at the expiration of the term pay for certain things at a valuation. After the lease had expired Messrs. Elliott continued in possession, and became tenants from year to year, subject to the stipulations of the lease, so far as they were applicable to the new relation, while they were tenants from year to year. It was contended on behalf of the plaintiff that Messrs. Elliott, against the will of their landlord and without any act of recognition on his part, could assign their interest in the tenancy, and the assignee would become a tenant of the original landlord and entitled to the benefit of the stipulations contained in the original lease. I think this cannot be. At common law a chose in action is not assignable; and on an assignment of a lease only such things would pass as are essentially inherent in the tenancy itself. The question is, whether or not by the mere force of the assignment a liability is created as between the landlord and the assignee to pay according to the stipulation in the lease for the things at a valuation. I am of opinion no such liability arises."

Thirdly, I would express my respectful agreement with what Murray-Aynsley C.J. (Singapore) says in his dissenting judgment in *Loke Yung Hong's* case:

> "I take it to be indisputable that tenants other than tenants at will and tenants at sufferance can assign their interests unless restrained by the terms of the agreement from which such interest is derived."

In *Hill & Redman's Law of Landlord & Tenant* (10th Ed. p. 501) the law is stated as follows:

> "A lessee for years or a tenant from year to year or *other term* has, in the absence of provision to the contrary, the right to assign his term or tenancy, or to create sub-leases or sub-tenancies; but a restraint on assignment or underletting is valid, and such restraint may be created either by condition making the lease void

in those events, or by covenant not to assign or underlet. Whichever form the restraint takes, an assignment in breach of the condition or covenant is not void. It is effectual to vest the term in the assignee, but the lessor can treat the assignment as a cause of forfeiture provided, in the case of a covenant against assignment, that it is accompanied by a proviso for re-entry."

I therefore hold that appellant having taken a valid assignment of the tenancy from Goh, the former tenant, who was not prohibited from doing so, was in lawful occupation of the premises.

The appeal is allowed and the judgment of the learned Magistrate set aside. The appellant will have the costs of this appeal and in the Court below, to be taxed.

Appeal allowed.

Solicitors: *Bannon & Bailey; S. M. Yong & Co.*

INDERJIT KAUR v. STATE ADVOCATE-GENERAL

[O. C. J. (Rose C.J.) September 2, 1959]

[Singapore — Suit No. 947 of 1959]

Immigration Ordinance (Cap. 102), s.7(1)(a) — Wife of a British Subject ordinarily resident in Malaya — Marriage contracted in India while one of the parties had a spouse living — Whether marriage contrary to Hindu Marriage Act, 1955 — Whether 2nd wife a person entitled to enter Singapore without Permit or Pass.

Sikh customary marriage — Marriage between a Sikh ordinarily resident in Malaya with a Sikh woman in India while he had a wife living — Whether parties are "two Hindus" to whom the Hindu Marriage Act, 1955 applies.

In this case the plaintiff went through a form of marriage according to Sikh customary law with one Bachan Singh at Brahmpore in India on May 22, 1958. At the time of the said marriage, Bachan Singh was already married to one Kartar Kaur, his principal wife. The plaintiff entered Singapore on February 22, 1959 and she contended that under section 7(1)(a) of the Immigration Ordinance as it then stood, she was entitled so to enter without having obtained a permit or pass by reason of the fact that she was the wife of a man who was a British Subject ordinarily resident in Malaya.

It was contended on behalf of the State Advocate General, that the plaintiff's marriage to Bachan Singh was not valid under the Hindu Marriage Act, 1955 in force in India.

Held: (1) marriages performed within any part of India except the State of Jammu and Kashmir are covered by the Hindu Marriage Act, 1955 if the parties (in the context of the present case) are Sikhs, wherever they are domiciled;

(2) any person who is a Sikh by religion within the meaning of section 2(1)(b) of the Act is subject to the provisions of the Act if he or she (wherever domiciled) goes through a form of marriage in any part of the territories to which the Act extends;

(3) as Brahmpore is in a part of India which is covered by the Act, the marriage which was purported to be performed on May 22, 1958 was invalid by reason of the fact that one of the parties, Bachan Singh, had a spouse living at the relevant time;

(4) the plaintiff, therefore, was unable to avail herself of the provisions of section 7(1) of the Immigration Ordinance as it stood at the relevant time. Her action therefore failed and must be dismissed with costs.

ACTION.

P. Coomaraswamy for the plaintiff.

Tara Singh (Crown Counsel) for the defendant.

Rose C.J.: On the 22nd of May, 1958 the plaintiff went through a form of marriage with one Bachan Singh at Brahmpore in India. I am satisfied from the evidence adduced that, so far as form is concerned, the ceremony complied with the requirements of Sikh customary law.

At the time of the said marriage it is common ground that the said Bachan Singh was already married by Sikh customary law to one Kartar Kaur, his principal wife.

The plaintiff entered what was then the Colony of Singapore on the 22nd of February 1959 and she contends that under the provisions of section 7 subsection (1)(a) of the Immigration Ordinance (Cap. 102), as it then stood, she was entitled so to enter without having obtained a permit or pass by reason of the fact that she was the wife of a man who was a British Subject ordinarily resident in Malaya.

It is not in dispute that Bachan Singh is a British Subject and a citizen of the United Kingdom and Colonies. Further, I am satisfied from the evidence adduced that he was "ordinarily resident" in Singapore within the meaning of section 2 of the Ordinance, as it appears that during the previous ten years he had resided in Singapore for all but a period of eleven months.

If, therefore, the marriage of the 22nd May 1958 was a valid marriage, the plaintiff would, in my view, be entitled to succeed. The question of the validity of the marriage must therefore now be examined.

Prior to the passing of the Hindu Marriage Act 1955 there can be no doubt that this marriage would have been regarded as a valid marriage It is common ground between the parties that the marriage is invalidated by the Hindu Marriage Act, if the parties are covered by it. Section 5 of the Act reads as follows:—

> "5. Conditions for a Hindu marriage. — A marriage may be solemnized between any two Hindus, if the following conditions are fulfilled, namely:—
> (i) neither party has a spouse living at the time of the marriage;".

Counsel for the plaintiff contends that the phrase "any two Hindus" means any two Hindus to whom the Act applies; and that the Act does not apply to a Hindu who is domiciled in some country outside India. He seeks support for his contention in the wording of section 1(2) of the Act which reads as follows:—

> "1 (2) It [The Act] extends to the whole of India except the State of Jammu and Kashmir, and applies also to Hindus domiciled in the territories to which this Act extends who are outside the said territories."

While the point is not without difficulty, I have come to the conclusion that the meaning of this subsection is that marriages performed